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401997—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 135

ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE UTZ WILDER, EXECUTRIX OF THE ESTATE OF A. M. WILDER, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 14–15) is not reported. The opinion of the United States Circuit Court of Appeals (R. 51–54) is reported in 118 F. (2d) 281.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 20, 1941 (R. 55). The petition for a writ of certiorari was filed June 6, 1941. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent purchased out of community property, annuity contracts payable to himself for life and thereafter to his wife for her life. May there be included in his gross estate one-half the value of the annuity contracts as of the date of his death?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. [As amended by H. J. Res. 529 of March 3, 1931, c. 454, 46 Stat. 1516, and as further amended by Sec. 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
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> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under

which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

* * * * *

(U. S. C., Title 26, Sec. 411.)

STATEMENT

The facts as stipulated (R. 30–45) and as found by the Board of Tax Appeals (R. 14–15) may be summarized as follows:

The decedent, A. M. Wilder, died in 1937, a resident of Louisiana (R. 14). In 1934 and 1936 he had purchased out of community property annuity contracts at an aggregate cost of $117,830.98 (R. 14–15). The contracts provided in the aggregate for monthly payments of $500 to the decedent for life and thereafter to his widow for her life. The

contracts were irrevocable, having no cash surrender or loan values, and making no provision for change of beneficiary (R. 15).

The Commissioner of Internal Revenue determined the value of the contracts to be $104,356.24 at the date of decedent's death, and included one-half of that amount, $52,178.12, in his gross estate. The Board of Tax Appeals reversed the action of the Commissioner (R. 15), but its judgment was in turn reversed by the Circuit Court of Appeals (R. 51–55).

ARGUMENT

The court below correctly ruled that to the extent that decedent purchased annuity contracts out of his own funds to commence at his death, he had made a transfer intended to take effect in possession or enjoyment at or after his death within the meaning of Section 302 (c), *supra,* p. 2. Cf. *Helvering* v. *LeGierse,* No. 237, 1940 Term, advance sheets, p. 5. It properly characterized the plan as one for "transferring money-values at death without administration" (R. 53). Moreover, since the decedent had reserved a life interest to himself, the result is further supportable by the more specific provisions in Section 302 (c) dealing with transfers in which the transferor has reserved a life interest. Cf. *Helvering* v. *Bullard,* 303 U. S. 297.

Petitioner alleges no conflict with any decision of this Court or of any other circuit court of ap-

peals, but does correctly point out that a contrary decision of the Board of Tax Appeals (*Clise* v. *Commissioner,* 41 B. T. A. 820) is now pending on appeal in the Ninth Circuit. The *Clise* case was argued on April 1, 1941, but no decision has yet been rendered. If that case should be decided contrary to the decision herein then we would not oppose the granting of the writ. However, if the *Clise* case should be reversed, there would be no basis for certiorari, since the decision herein is correct, and the question does not appear to be of such general importance to warrant further review in the absence of a conflict.

CONCLUSION

Unless a decision should meanwhile be rendered in the *Clise* case in conflict with the decision herein, the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

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